SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-483

THOMAS F. O'CALLAGHAN, as President, or CHARLES M. CROOKS, as Secretary-Treasurer, or WILLIAM M. CALDWELL, as Vice-President, of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Petitioners,

against

LLOYD SHELDON, VICTOR SOTO, JAMES CLIFFORD, ARTHUR SOHNEN, and JOHN HAYES, each of them individually and on behalf of all other members of INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statutes Involved	2
Statement of the Case	3
Argument	7
Conclusion	12

TABLE OF CASES AND AUTHORITIES

Boilermakers v. *Hardeman*, 401 U.S. 233	10
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327	11
Calhoon v. *Harvey*, 379 U.S. 134	11
Hamilton-Brown Shoe Co. v. *United States*, 240 U.S. 251	11
Madden v. *Atkins*, 4 N.Y.2d 283 (1958)	10
Labor-Management Reporting and Disclosure Act of 1959:	
Section 101(a)(1), 29 USC 411(a)(1)	2, 7
Section 101(a)(2), 29 USC 411(a)(2)	2, 8
Section 101(a)(3), 29 USC 411(a)(3)	2, 8
Section 102, 29 USC 412	3, 8
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, G.P.O. Washington, D.C., 1959	8

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Question Presented

Did the Court of Appeals err in holding, in the factual circumstances determined by the evidence as it stood at the time of dismissal of plaintiffs' case, that the referendum was rendered unfair and violative of rights guaranteed to Union members by Section 101 of the LMRDA, because of the Union's failure to allow opponents of the "new constitution" a reasonable opportunity to present their views to other members?

Statute Involved

1. Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 (the LMRDA), 29 U.S.C. Section 411(a)(1), is printed at page 2 of the Petition for Certiorari.

2. Section 101(a)(2) of the LMRDA, 29 U.S.C. Section 411(a)(2), provides as follows:

> "(2) Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

3. Section 101(a)(3) of the LMRDA, 29 U.S.C. Section 411(a)(3), provides in part as follows:

> "(3) Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—
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>
> (B) in the case of a labor organization, other than a local labor organization or a federation of national or

international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

4. Section 102 of the LMRDA, 29 U.S.C. Section 412, provides in part as follows:

> "Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. . . ."

Statement of the Case

For a period of some two years, from 1968 to 1970, the petitioner Union publicized among its members a proposal to "consolidate" its various "offshore" (or sea-going) locals into one local, to be termed an "Offshore Division." It proposed to adopt a "new constitution" that would accomplish this result.

In 1970 it submitted the finished product, the proposed "new constitution," for a referendum. But it did not tell its members that this "new constitution" contained many con-

stitutional amendments other than the "consolidation" proposal: among them a dues increase, a provision making the three International Officers automatically the three top officers of the "Offshore Division", a provision giving the three International Officers power to cast one-half the weighted vote of the "Offshore Division" on the International's General Executive Board (thereby dominating it), a hefty salary increase for the two already-salaried International Officers, and a large salary for the third, previously-unsalaried International Officer. In order to learn that the "new constitution" contained such amendments, a member would have had to read that entire, lengthy, complicated document and compare it with the pre-existing constitution.

The International Officers campaigned in favor of adoption of the "new constitution," at Union expense. Under the Union's letterhead, they sent a letter to every member urging adoption of the new constitution and mentioning a number of highflown considerations which, they said, they had had in mind when they drafted it. Also, in two issues of the Union's official journal that were published during the 90-day referendum period, they campaigned energetically in favor of it. But they printed *no* opposition opinion. Moreover, as the parties stipulated in the Pre-Trial Order in District Court:

> "(31) Neither any of the documents published by defendant as described above nor any other documents or written statements officially disseminated or published by defendant or by any of its officers at any time during the course of the referendum contained any statement or article by any of the plaintiffs or by any person opposed to adoption of the proposed 'new' constitution, nor did any publication of defendant contain any statement from any officer of Local 88 regarding the referendum nor did any publication of defendant advise members that Local 88's entire delegation at the

convention had voted against the proposed 'new' constitution.

"(32) Never, in any official publication of defendant nor in any issue of the defendant's official journal except in the document itself or where the same was reprinted, has defendant or any officer of defendant advised the membership that the proposed 'new' constitution provides for the three International Officers to become, by virtue of their International offices, the three chief officers of the 'Offshore Division' and of every other division of defendant and/or that it further provides that the three International Officers shall have the power to vote on behalf of fifty percent of the 'Offshore Division's' membership on defendant's General Executive Board; nor in any publication (other than the text of the document itself) has defendant or any of its officers advised the membership of these facts during or prior to the period of the referendum."*

In this situation, but prior to the sending out of referendum ballots, the five plaintiffs—who had been elected as a Special Constitution Committee by the membership of Local 88 in New York (the Union's second largest local union, second only to a local that comprised all the Union's members on the entire Pacific Coast)—asked the Union for an opportunity to express their views to the membership as a whole. Since the Union had already hired a mailing service to provide distribution of campaign literature at election times, and had provided it with its

* At the beginning of trial, defendant Union announced that it had discovered an exception to what is stated in Stipulated Fact No. 32, quoted above. The exception is a single sentence, appearing in the middle of an article on page 7 of the Union's official journal for October 1969. The sentence reads as follows (in its entirety): "Pro Rata share of offshore per capita vote."

The Union conceded that this enigmatic sentence, if it be an exception to Stipulated Fact No. 32, is the *only* exception to it.

mailing list of members, the five plaintiffs proposed that they be allowed distribution of their views, at their own expense, through such mailing service. The Union's Officers did not even reply to the plaintiffs' request.

Because of the Union's failure to respond to plaintiffs' request (and its failure to respond to alternative requests for space in the Union's newspaper), the views of opponents of the proposed "new constitution" were never distributed to the membership as a whole. The bulk of the Union's membership received only propaganda *favoring* adoption of the "new constitution." And most were kept in ignorance of what constitutional amendments were contained in the "new constitution." Yet even so, the "new constitution" was approved by a vote of only 2,781 for to 2,602 against, or a margin of only 179.

The Court of Appeals ruled that in this fact situation, the Union's failure to allow plaintiffs an opportunity to present their views to the other members of the Union made the referendum unfair. The Court took note, however, of the Union's contention, made on appeal, that, had the complaint not been dismisssed at the close of plaintifs' case, the Union would have presented evidence that opposition views had been distributed by Local 88, through its newspaper. Since such distribution, if carried out wilely enough, might have cured the unfairness, the Court of Appeals directed remand of the case for further trial proceedings, giving the Union an opportunity to substantiate its contention. However, instead of exploiting that opportunity the Union thereafter moved to stay the remand until determination of its petition for certiorari; its motion for such stay has been granted by the Court of Appeals.

Respondents (the plaintiff-members below) have filed a cross petition for certiorari, in No. 74—541, raising a diferent question involved in the decision below. The

cross petition is not made conditional upon granting of the original petition; it may properly be granted even though the petition here opposed be denied.

Argument

I.

Despite the excursions of the Union's petition into legislative history, what is raised here is not any question of general or broad applicability, but only the specific application of statutory principles to a particular and unusual factual situation.

The decision of the Court of Appeals is limited to the narrow and particular facts that were before it. Indeed, the Court explicitly based its holding "on the evidence as it stood at the time defendants' [the Union's] motion to dismiss was granted" (14a)—i.e., at the conclusion of plaintiffs' case. In its Amended Opinion, it explicitly described evidence that defendants stated they would have presented if their motion had not been granted. And it intimated that if, on remand, the facts should prove to be as defendants contended then a different result might be warranted.

The applicable law is clear and is not genuinely disputed by the petition. Certain rights are guaranteed to union members by Title I of the LMRDA, subtitled the Bill of Rights of Members of Labor Organizations. So far as these are relevant here they may be summarized as follows:

> (i) Section 101(a)(1) guarantees to every member of a labor organization "equal rights and privileges within such organization . . . to vote in . . . referendums of the labor organization . . . subject to reasonable rules and regulations in such organization's constitution and bylaws";

(ii) Section 101(a)(2) guarantees to every member the right "to express any views, arguments or opinions";* and

(iii) Section 101(a)(3) guarantees to members the right of a secret ballot vote on any dues increase, either through secret vote at a meeting, or by referendum, or through the convention process.

It is undisputed that if the free and meaningful exercise of any of these rights by union members is infringed, any such member may obtain injunctive and/or other relief in federal court pursuant to Section 102 of the LMRDA, 29 U.S.C. Sec. 412.

These statutory principles apply differently to different factual circumstances. The circumstances that were before the Court of Appeals concern a constitutional referendum conducted by a marine deck officers' union, whose membership is thinly spread all over the world, three or four of them on every vessel of the United States, and stationed in or near every American port, including the Canal Zone. Even more narrowly, they concern a referendum conducted in a barrage of one-sided progaganda favoring the proposals, while members opposed to the proposals were denied an opportunity to express their views and arguments to their fellow members.

Under the factual circumstances so evidenced, the Union's arbitrary denial of plaintiffs' reasonable request for an opportunity to present their views to the other

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* In the course of the Senate's consideration of what is now Title I. a semi-colon was inserted before the language quoted here (immediately after the word "members" in Section 101(a)(2)), in order to make clear that this right extended "not only in a union hall, but outside" (See: Colloquy between Senators McClellan and Cooper, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, page 1231 (G.P.O., Washington, D.C., 1959).

members of the Union rendered the referendum unfair, and infringed the rights guaranteed to union members by Section 101. Not only did such denial infringe the plaintiffs' rights to express views, arguments or opinions; additionally (or alternatively) it infringed the rights of voting members of the Union to cast a free and informed vote based upon knowledge of the issues and upon a free exchange of views among the membership. A right to vote in a referendum has little meaning if members are required to vote blindly, without an opportunity to base their votes upon knowledge of the arguments and opinions opposing, as well as those favoring, the proposals to be voted upon.

Had the plaintiffs demanded actual possession of the Union's mailing or membership lists in order to distribute their views, a serious question might have been raised; see: footnote 8 to the decision below and related text, page 12a, App. to Pet. for Cert. But they did not. Plaintiffs asked instead that their views be distributed at their own expense through a mailing service selected by the Union, a practice that the Union customarily utilizes for distribution of election campaign literature and, since 1970, for distribution of views generally (see: Opinion below, at page 11a, App. to Pet. for Cert.). Under the procedure requested, the membership lists would never have to be turned over to the plaintiffs or even inspected by them; the lists would remain without the Union's exclusive possession. Accordingly this case does not raise any question of members' rights under the LMRDA to inspect or possess membership lists. It merely raises the question, within a narrow fact situation, of the meaning of a fair referendum.

The petition for certiorari fails to present a question of sufficient breadth or generality to require review by this Court. Its only challenge to the decision below derives from a differing assessment of the factual situation upon which the decision is based.

II.

If this Court were to reverse the Court of Appeals on the question presented by the Union's petition, it would merely be sending the case back to the Court of Appeals for determination of precisely the same question on the basis of New York common law.

The Union's constitution, as it stood at the time of the referendum, required a secret-ballot referendum for the adoption of any dues increase or other constitutional amendment. In common law terms, it required a *fair* referendum. New York law regards a union constitution as a contract between the Union and its members. Public policy relating to free speech and fundamental fairness is made by common law a part of that contract. See: *Madden* v. *Atkins*, 4 N.Y.2d 283, at 293 (1958).

Similarly, common law appears to give Union members not only the rights of fairness and meaningful expression of their views, which underlie the decision below, but even larger rights of inspection and use of membership lists. See: the cases cited in footnote 8 of the decision below, at page 12a of the Appendix to the Petition for Certiorari.

As the Court below notes (at *loc. cit.*) and as this Court has had occasion to remark, the LMRDA was not intended to narrow the rights of union members. Common law rights may be broader than those guaranteed by the LMRDA itself. *Boilermakers* v. *Hardeman*, 401 U.S. 233, at 244, fn. 11.

It follows that if this case were to be reversed on the issue that is pressed by the Union's petition, and sent back for reconsideration of that question on the basis of the Court's pendent jurisdiction over the common law claims arising from the subject-matter of the complaint,* the

* The District Court explicitly accepted pendent jurisdiction over the common law claims referred to.

same result would in all likelihood continue to obtain below, though on common law grounds instead of statutory ones.

III.

The decision of the Court of Appeals remands the case to District Court for the completion of trial. Specifically, it remands the case for the presentation of defendants' (the Union's) evidence. Its Amended Opinion even goes so far as to intimate that if on remand defendants present the evidence which they state they would have presented if their motion to dismiss had not been granted, a different result may follow. (See: Amended Opinion, at pages 14a-15a of the Appendix to Pet. for Cert.)

Accordingly, the decision below, being interlocutory in nature, is not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *United States*, 240 U.S. 251, 258.

IV.

The case may be viewed as unripe for review by this Court in a more substantive sense as well. The guarantee to union members of rights to vote in referenda, of rights to referenda on dues increases, and of rights to express views, arguments and opinions opens up many uncharted areas for judicial protection of union members' rights. Sound judicial policy may well require that the Courts of Appeals be allowed a certain latitude in the formulation of principles designed to protect those rights, with this Court staying its hand until those principles become clearly formulated by the courts below or until a conflict in their application develops between circuits. Compare: *Calhoon* v. *Harvey*, 379 U.S. 134, 137, at fn. 10.

CONCLUSION

For the reasons set forth above, the Union's petition for certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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